



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CONSTITUTION PETITION NO. 7 OF 2014

IN THE MATTER OF: ARTICLES 2,40 AND 260 CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: INTERPRETATION OF ARTICLES OF THE CONSTITUTION AND CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS GUARRANTED BY THE CONSTITUTION UNDER ARTICLES 2, 19, 21,22,23,29,31,40,46,165,258,259 AND 260

AND

IN THE MATTER OF THE INSURANCE ACT CAP 487 LAWS OF KENYA

AND

IN THE MATTER OF: THE INSURANCE MOTOR VEHICLES THIRD PARTY RISKS CAP 405 LAWS OF KENYA ACT AMENDMENT ACT 2013

AND

IN THE MATTER OF: MERCY WAITHIRA

AND

IN THE MATTER OF: UNITED INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF: SUITS AGAINST CATHERINE WACHIRA AT KERUGOYA CHIEF MAGISTRATE COURT NAME CIVIL CASE NO. 219 OF 1999

CATHERINE WACHIRA –VS- MERCY WAITHIRA AND CIVIL CASE NO. 284 OF 2000 AT KERUGOYA JAMES KAGUGA – V- MERCY WAITHIRA

AND

IN THE MATTER OF: STATUTORY MANAGER OF UNITED INSURANCE COMPANY

BETWEEN

MERCY WAITHIRAPETITIONER

AND

UNITED INSURANCE COMPANY LIMITED

STATUTORY MANAGER1ST RESPONDENT

THE COMMISSIONER OF INSURANCE (*Sued in his capacity*)

As Chief Executive Officer of Insurance Regulatory Authority).....2nd RESPONDENT

THE MINISTRY OF FINANCE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL..... 4TH RESPONDENT

JUDGMENT

1. The Petitioner Mercy Waithira filed this petition under Articles 2, 19, 20, 21, 22, 23, 29, 31, 40, 46, 165, 258, 259 and 260 of the Constitution, the Insurance Act, The Insurance Motor vehicle 3rd Party Risks against United Insurance Company Limited and Statutory Manager, Commissioner of Insurance, The Ministry of Finance, The Attorney General.

2. In a nutshell all the applicant is seeking, is, if accident occurs and her car was duly insured, the Insurance Company happens to go bankrupt without due notice by the relevant regulating authority, is the liability to be borne by the said regulating authority or the Government so to speak. The applicant has sought compensation.

3. A declaration that the petitioner having complied with the necessary provisions of the law of the Insurance Act be protected from any liabilities arising from the insurance cover and the respondent be declared collectively responsible for the said liabilities and cover.

4. On 08/12/1998 motor vehicle KAC 263S was involved in an accident along Kerugoya-Kutus road whereby several people were injured. The motor vehicle was at the time insured by United Insurance Company Limited vide Certificate No. 871176. The petitioner was sued by the injured passengers and United Insurance instructed their advocates to defend her. The insurance settled some of the claims remaining with 2 claimants. Unfortunately, the insurance company went bankrupt and was put under liquidation and the remaining claimants are seeking that their claims be paid by the petitioner.

5. What the petitioner seeks now for determination is, Is it fair? Is it justified? Whereas the petitioner is protected by the constitution from deprivation of property and discrimination against, the respondents to whom the law has provided for all checks and balances to avoid the petitioners' imminent loss did not perform their legal obligations. That due to no default by the applicant the applicant is due to suffer irreparable loss whereas the respondents who could have avoided the loss and damage walk as if it's none of their business?

6. The 2nd respondent on the other hand stated that the petitioner has failed to annex any documents to show she has proved her debts against the Insurance Company neither is there proof that she filed her proof of debts with the Statutory Manager and therefore her claims against the Insurance Company are not substantiated. In addition, where an insurance company is under statutory management then payment of claims is hampered by a declaration of moratorium on payment to creditors. That the reinsurance Company cannot compensate the unpaid claims directly to the claimants since there is no contractual relationship between the policyholder/claimant under the insurance contract and the Reinsurance Company.

7. The 3rd and 4th respondents filed their response and stated that upon experiencing financial difficulties, United Insurance Company was placed under statutory management on 15/07/2005. That Kenya Reinsurance Corporation was appointed as a statutory manager for the Insurance Company and the tenure has been extended from time to time with the last extension being up to September 2014. That upon appointment and pursuant to **Section 67 C (10) of the Insurance Act**, the statutory manager declared a moratorium over payment to policyholders and other creditors. The said moratorium remains in force up to September 2014. In addition, the statutory manager secured a High Court order staying all proceedings and execution of judgment against the Insurance Company and its policyholders during the subsistence of the statutory management.

This matter has been pending since 2014 because when it came up for fixing a hearing dated on 13/7/15 after it had been in court for one year, the parties were not present and it prompted the Judge to refer it back to the registry. It was not until 24/7/17 that parties appeared for directions and three years down the line the respondents had not filed their responses. They were given time to file responses. It was not until 5/3/18 that the parties took directions that the petition proceeds by way of written submissions. It was not until 13/11/18 that the parties filed submissions and a date for judgment was given.

8. I have now considered the application, the responses and the submissions. The issue which arises for determination as submitted by the applicant is whether having taken an Insurance cover for her motor vehicle, and unfortunately the vehicle is involved in accident, and the Insurance happens to go bankrupt, what is the role of the regulating authority or the Government. Her submission is that having complied with the necessary provisions of the law under the Insurance Act, she is protected from any liability arising from the Insurance cover and the respondents be declared responsible for the said liabilities and cover.

9. For the respondents, the issue which they raise are whether their conduct constitutes a violation and contravention of the constitution, whether the suit is res judicata and whether the petitioner is entitled to the orders as prayed.

10. It is submitted that the objective of the Insurance Regulatory Authority are well laid out under Section 3A of the Insurance Act. The Commissioner of Insurance has power to intervene under **Section 67C of the Insurance Act** and it is in the exercise of those powers that the commissioner placed the United Insurance Company under Statutory Management on 15/7/15 and Kenya Reinsurance Corporation was appointed as Statutory Manager whose tenure has been extended from time to time. That there is established a Policy Holders Compensation Fund as a State corporation under the National Treasury for the Primary purpose of providing compensation to claimants of an insurance that has been declared insolvent. It is submitted since the contract of Insurance is between the insured and the insurer, the Act does not contemplate a scenario where the liability under the Insurance contract is to be taken by any other party other than the contracting party in accordance with the principles of privities of contract. That if the Insurance Company cannot make good the liability then the insured takes the liability.

11. The issue for determination is whether the existence of a 3rd party mandatory Insurance acts as bar or exonerates the policy holder (insured) from liability to 3rd parties where a party has insured his motor vehicle as required under the law he has a legitimate expectation that in the event of an accident being one of the risks insured, the Insurance Company will compensate, pay or settle claims by 3rd parties. The Insurance Act makes provisions for the settlement of claims by 3rd parties. This is under **Section 10(1) of the Insurance Motor Vehicle Third Party Risks Act** which provides that the insurer has a duty to settle claims against parties it has insured. It provides:-

“(1) If, after a policy of insurance has been affected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

The provision places a statutory obligation on the Insurer to settle claims to claimants who have obtained Judgment against the insured. In respect of the liability to 3rd parties who have suffered injury arising from the use of the insured’s motor vehicle on the road. The insured has a legitimate expectation that having performed her part of the contract the Insurance Company would settle claims in the event of an accident or risk and judgment is entered against her.

12. The question then arises as to what happens where the Insurance Company becomes insolvent and is unable to settle claims against its insured. This was considered in the case of **Kenny Jaden Kwanyi –v- Minister for Finance and 3 others (2005) eKLR.**

“The contract of insurance is between him (the insured) and the insurer (the Insurance Company). If the Insurance Company has collapsed he must carry that risk in a free enterprise system such as ours, the insurer was a company of this choice. If he had Insured with a better managed Insurance Company, the risk he took could have been absorbed. He probably insured in good faith, believing that since the Insurer was licensed by the state, it was a good bet to insure with. He lost. His only right is to prove the loss or debt (represented by the decree against him) with the statutory manager, receiver or liquidator.”

The contract of Insurance is between the insurer and the Insured. If like it happened to United Insurance Company that it became insolvent and was unable to settle the claims by 3rd parties against the insured, it is the insured who has the responsibility to settle those claims by 3rd parties. Justice Mumbi Ngugi in **Duncan Mogaka Muchira –v- Minister for Finance & 4 Others** stated:-

“It is a balancing act. The primary liability in my view is that of the insured. There is a valid decree of court against him or it, and so long as the decree subsists he is liable to satisfy it.” (emphasis added).

32. This, is in my view, is for good reason. The balancing act involves weighing the competing claim of the insured, who made the unfortunate choice of an Insurance Company that was, for whatever reason, rendered insolvent, and a third party who is not party to the contract of insurance but has a Judgment against the insured. The scales, surely must tilt in favour of the third party. Which leads me to the second main issue raised in this application.”

I am persuaded by this holding.

It is the insured who has the responsibility to settle the claims by the 3rd parties who have obtained Judgment against her and cannot shift the responsibility to parties who were not parties to the contract. The liability is on the insure and cannot be transferred to another party.

13. On the issue of Res Judicata:-

It is submitted that where a matter has been determined by a sub-ordinate court, where a party is not satisfied he proceeds to file an appeal and not a Constitutional Petition. Reference was made to **Booth Irrigation –v- Mombasa Water Company Msa HCCC No. 1052/04** where the court held that unchallenged court order

cannot be a basis of constitutional application to prevent execution. Also in **Omega Credit –v- Mount Kenya Roses Ltd C.A No. 700/1998** reported in **Kennedy Kinya Hiukia –v- Statutory Manager United Insurance Co. Ltd & 3 Others (2008) eKLR** where it held that where one satisfies a decree, it does not amount to a violation of his constitutional rights.

The petitioner did not annex documents to prove that she has debts against United Insurance Company (under receivership) or proof of debts with official receiver. As submitted she has not substantiated her claim.

14. The judgment in Kerugoya Civil Cases No. 219/1999 and 284/2000 determined liability against the petitioner. Having stated that it is now the duty of the petitioner to settle the claims by 3rd parties due to the inability by the Insurance to settle them and that the decision of the court being not a basis for a constitution petition, the claim by the petitioner is res judicata.

15. Finally, whether the execution of the decree against the petitioner amounts to a violation of her rights.

It has been settled in law that a petitioner who alleges violation must state and identify the rights with precision and how the same have been or will be infringed with respect to him. This was stated in **Anarita Karimi Njeru –v- R (1976 – 1980) KLR 1272.**

This question whether there is a violation of rights through the execution of a decree of a court was considered in the case of James Ng'ang'a Njenga –v- Commissioner of Insurance & 3 Others (2011) eKLR where it was stated:-

“As a starting point in this aspect, it is important to note that the root of this petition is a lawfully obtained court decree by the 3rd party against the petitioner. In pursuing settlement or execution of the said decree, the 3rd party was actually exercising her right. She was not seeking to unlawfully dispossess the petitioner of his property. Just like the petitioner, she too has fundamental and inherent rights under the Constitution which need to be protected and respected including her right to the protection of the Law under S.70 (c) of the now repealed Constitution. Indeed the proviso to that Article (sic) provides categorically that the said rights are “subject to such limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

By trying to invoke the provisions of Section 70 of the Constitution in this matter to avoid settlement of a court decree, the petitioner is actually seeking to trample on the same rights belonging to the 3rd party.”

a. I am in agreement that execution of lawful judgment and orders of a Court do not amount to a violation of rights. It is a lawful process authorized by the constitution. The petitioner has failed to prove any violations of her constitutional rights by the respondents.

The applicant made no effort to place any material upon which this court could find the respondents should be held liable for the collapse of the United Insurance Company Limited and that they be compelled to indemnify them for any claims they may have to meet in consequence of its collapse. I find that the claim against them must fail.

In Conclusion:-

I find that the petition is without merits and is dismissed with costs to the respondents.

Dated at Kerugoya this 8th day of February 2019.

L. W. GITARI

JUDGE